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ARTICLE III VERSUS BANKRUPTCY JUDGES AND MAGISTRATES—A PARTIAL TRIUMPH OF PRINCIPLES OF SEPARATION OF POWERS OVER THE PRAGMATISM OF DOCKET CONGESTION.

· WILLIAM VANDERCREEK*

The Bankruptcy Reform Act of 1978¹ which greatly expanded the jurisdiction of the federal Bankruptcy Court and conferred virtually full independent judicial power upon the bankruptcy judges,² with the exception of article III status,³ has been dealt a capital blow by a divided United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁴ Not unlike other capital cases, a stay of execution was initially granted until October 4, 1982, to provide for congressional action.⁵ This stay was judicially extended through December 24, 1982,⁶ to enable Congress to revive and hopefully cure the fatal jurisdictional defects of the Bankruptcy Act.⁷ The ninety-seventh Congress, however, failed to make any further progress on new bankruptcy legis-

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This article was completed before the first session of the ninety-eighth Congress convened.

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. II, 92 Stat. 2549 (1978) (codified at 28 U.S.C. §§ 151-160, 771-775, 1471-1482 (Supp. III 1979)) (effective April 1, 1984).

2. The 1978 Act creates a United States Bankruptcy Court in each judicial district, eliminating the referee system utilized by the federal district courts. 28 U.S.C. at § 151(a).

The court's jurisdiction over title 11 (bankruptcy matters) includes "all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. at § 1471(c). This enables the bankruptcy courts to entertain "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. at § 1471(b).

3. Article III of the United States Constitution mandates as protection for judges exercising the judicial power of the United States tenure during good behavior and a guarantee against salary diminution. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

The Bankruptcy Reform Act of 1978 does not afford these protections. The bankruptcy judges are appointed for 14-year terms and may be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. at § 153. The salaries of the judges are subject to adjustment under the Federal Salary Act of 1967. 28 U.S.C. at § 154.

4. 102 S. Ct. 2858 (1982).

5. "This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S. Ct. at 2880 (Justice Brennan, writing for the plurality, was joined by Justices Marshall, Blackmun and Stevens).

6. 51 U.S.L.W. 3259 (1982).

7. See *infra* notes 15-16 and accompanying text (discussing the proposed bills addressing *Northern Pipeline*).

lation. As the solicitor general's motion to extend the stay of judgment beyond the December 24 deadline was denied, the Supreme Court has effectively forced Congress to promptly restructure the bankruptcy courts, resurrect the pre-1978 system or abandon the issue leaving a multitude of bankruptcy suits with no apparent jurisdiction. The *Northern Pipeline* decision and Congress' resolution of the important questions decided therein will, of necessity, have profound impact concerning the expanding role of United States magistrates, which the Supreme Court recently upheld in its present form in *United States v. Raddatz*.⁸

Although there is precedent to support a holding that a judgment by an article I tribunal of an article III case or controversy is subject to collateral attack,⁹ in what could be labeled the anti-catastrophic or self-destruction exception, the Supreme Court has made its ruling in *Northern Pipeline* prospective only.¹⁰ Any other ruling would be unthinkable, unless the separation of powers doctrine is supposed to promote anarchy.¹¹

This article will examine the strengths and weaknesses of the two, and possibly four, political alternatives from which Congress must choose. The two apparent choices are (1) to confer article III status upon bankruptcy judges, or (2) to reduce the independent judicial power of the bankruptcy judges and place them under the direct supervision and control of the district judges, to the extent that they may be fairly analogized as the functional equivalent of a

8. 447 U.S. 667 (1980). See Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1027-28 and 1028 n.27 (1979); Comment, *An Expanding Civil Role for United States Magistrates*, 26 AM. U.L. REV. 66 (1976).

9. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828). See *Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962) ("Article III, § 1, . . . is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record."). In *Canter*, Chief Justice Marshall reached the constitutional issue on the rationale that the judgment would be void on collateral attack. In *Glidden*, the Court considered the article III status of a judge to be a jurisdictional issue, which could be raised for the first time on appeal. The Court noted that res judicata principles were not involved. The Court has upheld lack of subject matter jurisdiction from collateral attack. See *Durfee v. Duke*, 375 U.S. 106, 112-16 (1963).

10. 102 S. Ct. at 2880. The Court cited *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in setting forth the three considerations as to the retroactive application of a holding. First, the Court found "Congress' broad grant of judicial power to non-Art. III bankruptcy judges present[ed] an unprecedented question of interpretation of Art. III." Next, the Court in pragmatic fashion reasoned that to apply the decision retroactively "would not further the operation of our holding." Finally, the Court stated the obvious—the decision would "visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Id.*

11. See THE FEDERALIST No. 49, at 315-20 (J. Madison) (J. Gideon ed. 1818).

special master. A variation of the second choice would be merely to remove jurisdiction over controversies such as the one involved in *Northern Pipeline*.¹² The third choice would be for Congress to create an administrative bankruptcy system with attendant jurisdiction vested in an administrative agency as has been done, for example, in reference to labor disputes and the National Labor Relations Board.¹³ The availability of this choice, and the variation of the second option, would depend upon prognosticating correctly the views of Justices Rehnquist and O'Connor.¹⁴

At this juncture the House appears to have opted for the choice of conferring article III status on bankruptcy judges while the Senate appears to favor reducing the independence and power of the bankruptcy judges.¹⁵ The proposed bills are too divergent to be

12. Northern Pipeline Construction Company instituted the lawsuit in district court charging Marathon Pipe Line Company with breach of contract and warranty and seeking enforcement of a mechanics lien. Thereafter, Northern filed in bankruptcy court for reorganization under chapter eleven of the Bankruptcy Code.

As a debtor in a proceeding for reorganization, Northern filed its pending suit against Marathon in bankruptcy court. Marathon moved for dismissal but its motion was denied by the bankruptcy court. Marathon's motion to appeal was first denied by the district court, then granted upon reconsideration. The district court dismissed the adversary proceeding against Marathon holding that the delegation of authority in 28 U.S.C. § 1471 to the bankruptcy judges was an unconstitutional delegation of jurisdiction.

13. See *infra* note 104 and accompanying text.

14. Justice Rehnquist, with Justice O'Connor joining, concurred in a separate opinion in the judgment of the plurality, thus totalling six justices finding the 1978 Act's broad grant of jurisdiction to bankruptcy judges unconstitutional. Chief Justice Burger filed a dissenting opinion and Justice White authored a dissenting opinion in which Chief Justice Burger and Justice Powell joined.

15. H.R. 6978 proposes to elevate bankruptcy judges to article III status. The bill was introduced on August 12, 1982, by House Representative Rodino. H.R. 6978, 97th Cong., 2d Sess., 128 Cong. Rec. H5871 (daily ed. Aug. 12, 1982) (statement of Rep. Rodino). The bill was reported favorably out of committee on August 9, 1982. House Comm. on the Judiciary, Bankruptcy Court Act of 1982, H.R. REP. NO. 807, 97th Cong., 2d Sess. 1 (1982). Representative Rodino is also chairman of the House Judiciary Committee. The Senate Judiciary Committee has not yet acted on a bill proposing article III status.

In contrast to 6978, Senator Dole had supported a bill providing for bankruptcy cases to be heard in the district courts, eliminating bankruptcy courts. Bankruptcy judges would comprise a *division* within the district court. Reportedly, Senator Dole (member of the Senate Judiciary Committee and chairman of its Subcommittee on Courts) and Senator Thurmond (Chairman of the Senate Judiciary Committee) vigorously oppose article III power and protection for bankruptcy judges. 40 Cong. Q. Weekly Rep. 2200-01 (No. 36, 1982); 40 Cong. Q. Weekly Rep. 2645 (No. 41, 1982). On October 1, 1982, Representative Butler introduced an omnibus bill (concerning *inter alia* Federal Court Reform, Judicial Survivors Annuities, United States Trustee Program, Consumer Credit, Grain Elevator Bankruptcy Amendments, Leasehold Management and a Bankruptcy Court Act) in the House, H.R. 7294, which contains Dole's proposals. H.R. 7294, 97th Cong., 2d Sess., 128 CONG. REC. E4649-51 (daily ed. Oct. 1, 1982) (statement of Rep. Butler).

H.R. 7294 creates within each district court a bankruptcy division consisting of district

compromised through minor and technical amendments.¹⁶ The political choices for Congress are every bit as hard as the constitutional problems considered by the court.¹⁷ The constitutional parameter of Congress' options necessarily revolve on the perceptions of the meaning of the *Northern Pipeline* decision. If one agrees with the concurring opinion by Justice Rehnquist, with whom Justice O'Connor joins, the issue is quite simple and straightforward. The plurality opinion of the court, however, written by Justice Brennan with whom Justices Marshall, Blackmun and Stevens concurred, was predicated upon much broader principles, as revealed by Justice Brennan's response to appellant's interpretation of the 1978 Act:

Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends" . . . Second, appellants contend that even if the Constitution does require that this bankruptcy-related action be adjudicated in an Art. III court, the Act in fact satisfies that requirement. "Bankruptcy jurisdiction was vested in the dis-

judges assigned to the division. As the district court judges sitting in the bankruptcy division remain district court judges, the 1978 Act's tenure and salary provisions are no longer necessary. H.R. 7294 was referred to the House Judiciary Committee though no action has been taken on it yet. Also, there is a possibility that Senator Dole's proposals could be tacked onto S. 2000, the bill that would make it tougher to declare consumer bankruptcies. 40 Cong. Q. Weekly Rep. 2201 (No. 36, 1982). This may be the only recourse for those senators opposing article III status for bankruptcy judges. The chances of a similar bill, such as H.R. 7294, surviving Chairman Rodino's Judiciary Committee on the House side would appear slim. See 128 Cong. Rec. S13050-51 (daily ed. Oct. 1, 1982) (statements of Sen. Dole and Sen. Metzenbaum).

16. The conflicting positions of the two bills are apparent, especially considering the political makeup of the House and Senate and their respective Judiciary Committees.

Additionally, a third bill, H.R. 7132, was introduced by Rep. Kastenmeier and referred to the House Judiciary Committee on September 16, 1982. H.R. 7132, 97th Cong., 2d Sess., 128 CONG. REC. H7173, E4253-54 (daily ed. Sept. 16, 1982) (statement of Rep. Kastenmeier). H.R. 7132 was sponsored by the Judicial Conference of the United States which is headed by Chief Justice Burger and gives the bankruptcy courts a jurisdiction similar to that granted by the 1978 Act. Under H.R. 7132, a case may be recalled by motion, or by the district or bankruptcy judge. The district judge shall then determine the case or refer it to a United States magistrate. It is questionable whether this bill creates a true "adjunct" and cures the article III deficiencies of the 1978 Act.

17. The battle lines are being drawn almost identically to those drawn over the 1978 Act. In 1978, the Senate refused to endow bankruptcy judges with article III protections and the resulting 1978 Act was a compromise by the House in order to allow the judges the broad authority in § 1471. 40 Cong. Q. Weekly Rep. 2200-01 (No. 36, 1982).

strict court" of the judicial district in which the bankruptcy court is located, "and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Art. III court."¹⁸

Justice Brennan's comment that "Congress cannot withdraw from [art. III] judicial cognizance *any* matter which *from its nature* is the subject of a suit at common law, or in equity or admiralty,"¹⁹ must be interpreted to mean that Congress cannot withdraw jurisdiction from an article III court and transfer it to an article I court. The justice acknowledges that Congress could vest all bankruptcy jurisdiction in state courts, but considered this irrelevant to the decision *sub judice*.²⁰ It was on this broader issue that the dissent of Justice White, joined by the Chief Justice and Justice Powell, was bottomed.²¹

The opinion of Justice Rehnquist is not only appealing in simplicity, but also relates directly to the issue that is most legitimately presented by the facts of the cause.²² One could speculate as to the possibility of Justices Rehnquist and O'Connor upholding an administrative bankruptcy system. Rehnquist points out that Marathon moved to dismiss the case due to the tenure and salary shortcomings of the bankruptcy judges. As of yet in the *Northern Pipeline* suit, argues Justice Rehnquist:

Marathon has simply been named defendant in a lawsuit about a contract. . . . Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises 'the judicial power of the United States' described by Article III of the Constitution. But resolution of any objections it may make on this ground to the exercise of a different authority conferred on Bankruptcy Courts by the 1978 Act . . . should await the exercise of such authority.²³

18. 102 S. Ct. at 2867 (quoting Brief for United States at 9, 12).

19. 102 S. Ct. at 2870 n.23 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (emphasis added)).

20. 102 S. Ct. at 2867 n.15. Justice Brennan acknowledges that Congress in dealing with public rights may create administrative remedies for initial determination by a federal agency.

21. *Id.* at 2882 (White, J., dissenting, joined by Burger, C.J., and Powell, J.).

22. The facts are set out in footnote 12, *supra*.

23. 102 S. Ct. at 2881 (Rehnquist, J., concurring). In addition, Justice Rehnquist does not find the bankruptcy courts to be "adjuncts" of the district courts due to the presence of "traditional appellate review" (lack of de novo review) and the bankruptcy courts' authority to resolve "[a]ll matters of fact and law in whatever domains of the law to which the parties'

Simply put, the bankruptcy proceeding in *Northern Pipeline* was what previously would have been classified as plenary as distinguished from a summary action;²⁴ that is, an independent suit which would have been brought by the parties in either state court or, if diversity or federal question jurisdiction would lie, in the federal district court.²⁵ *Northern Pipeline* presented a traditional judicial controversy fully within the scope of article III and one that but for the Bankruptcy Reform Act, would have been determined, if in a federal court, by an article III judge.

With reference to the political choices available to Congress, Chief Justice Burger, in a classic illustration of doing what cannot be done under article III,²⁶ gave Congress an advisory opinion:

It will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication. The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in this case, be routed to the United States district court of which the bankruptcy court is an adjunct.²⁷

The singular advice of the Chief Justice would, of course, be supported by the rationale of the dissent, but certainly not by Justice Brennan's plurality opinion.²⁸ Congress may well choose to be cau-

dispute may lead." 102 S. Ct. at 2882. One might guess that a properly constructed administrative bankruptcy system would be approved by Rehnquist.

24. Before the 1978 Act, cases heard by bankruptcy referees covered only the disposition of property held by the debtor and were termed "summary." See note, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489 (1940). Those claims touching upon the debtor's property but not seeking distribution to creditors were "plenary" and independent in nature from the bankruptcy itself.

25. One purpose of the 1978 Bankruptcy Reform Act was to eliminate the summary/plenary jurisdiction distinction. 102 S. Ct. at 2862. Agreeing that the pre-1978 summary/plenary dichotomy resulted in wasteful litigation, undue cost and general inefficiency, there was no call for a return to this system by the witnesses appearing in the hearings before the congressional committee on the *Northern Pipeline* problem. House Comm. on the Judiciary, H.R. Rep. No. 807, 97th Cong., 2d Sess. at 14-15 (1982).

As the Court noted in *Northern Pipeline*, the broad powers exercised by non-article III bankruptcy judges prior to 1978 (under the summary/plenary system) "which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee . . . have never been explicitly endorsed by this Court." 102 S. Ct. at 2876 n.31.

26. See *Muskrat v. United States*, 219 U.S. 346 (1911).

27. 102 S. Ct. at 2882 (Burger, C.J., dissenting).

28. Justice Brennan, writing for the plurality in *Northern Pipeline*, refrained from steering Congress to any one solution. Justice Brennan preferred leaving the job to "Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose." *Id.* at

tious in accepting the Chief Justice's solution as it does not meet the fundamental problems of the independence of bankruptcy judges and the vesting in them of virtually the full judicial powers of an article III judge.

Considering that the sole purpose of article III was the establishment of a judicial branch of a government to operate under an integrated system of checks and balances with the executive and legislative branches in order to produce a true and meaningful democracy,²⁹ the Court's conceptual divergence concerning article III is most troublesome. Indeed, although the equal protection clause, for example, has produced a large mosaic of opinions that do not necessarily merge into a simple pattern, the relatively few cases concerning article III, particularly in later years, have been marked by plurality decisions displaying fundamental differences among the justices concerning the constitutional limitations placed upon Congress.³⁰

The framers of the Constitution in providing for the judicial branch drafted article III to serve multiple functions.³¹ To a large extent, these are not seriously debatable. The article established the Supreme Court while leaving its organization, such as the number of justices and term of court, to Congress.³² It vested the Supreme Court with certain original jurisdictions and authorized Congress to confer additional jurisdictions upon the Supreme Court and such inferior courts which Congress would from time to

2880 n.40.

29. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

30. *United States v. Raddatz*, 447 U.S. 667 (1980); *Palmore v. United States*, 411 U.S. 389 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); *O'Donoghue v. United States*, 289 U.S. 516 (1933); *Crowell v. Benson*, 285 U.S. 22 (1932); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

31. "The judicial Power shall extend [1] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; [2]—to all Cases affecting Ambassadors, other public Ministers and Consuls; [3]—to all Cases of admiralty and maritime Jurisdiction; [4]—to Controversies to which the United States shall be a Party; [5]—to Controversies between two or more States; [6]—between a State and Citizens of another State; [7]—between Citizens of different States; [8]—between Citizens of the same State claiming Lands under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2. See *THE FEDERALIST* Nos. 78, 79, 80, at 482-501 (A. Hamilton) (J. Gideon ed. 1818).

32. U.S. CONST. art. III, § 1, 28 U.S.C. §§ 1-5 (1976).

time establish, subject to the limitations and grants contained in the article.³³ All of the grants of jurisdiction, or more precisely authorization to confer jurisdiction, are designated and defined as well as limited by the case or controversy proviso.³⁴ The nine defined authorizations of subject matter jurisdiction that Congress can confer, such as alienage, diversity, federal question and admiralty, are considered separate grants. Thus even though a maritime or admiralty claim could be thought of as involving federal law or arising under constitutional powers, it does not constitute a case "arising under" for purposes of federal question jurisdiction and the corresponding right to a jury trial.³⁵

Although early in the life of the Republic, and at a time the federal courts' dockets did little to justify their existence, Justice Story expressed the view that Congress had the duty to confer the whole of the jurisdiction possible under article III,³⁶ it seems to be beyond cavil today that Congress can confer less and may impose statutory conditions and restrictions on the jurisdiction it does choose to confer.³⁷ The most common example of the latter is the

33. U.S. CONST. art. III, §§ 1-2. The limitation in article I, § 1 is the source of the 1978 Act's failing. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. I, § 1.

34. U.S. CONST. art. III, § 2. See C. WRIGHT, LAW OF FEDERAL COURTS § 12 (3d ed. 1976).

35. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

36. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 327-37 (1816) (sustaining § 25 of the Judiciary Act giving the Supreme Court appellate jurisdiction over the courts).

37. It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, — either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850).

See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting). Justice Frankfurter so phrased Congress' power: "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*."

jurisdictional amount limitation now found in diversity actions.³⁸

The troublesome problems of article III that provide the grist for the *Northern Pipeline* case concern the ability of Congress to combine article I and article III jurisdiction and to create and utilize administrative remedies for determination by a non-article III tribunal. The problems, therefore, involve constitutional limitations upon Congress' political options. The more recent plurality decisions urge in support of their conflicting premises the primordial and unanimous decision written by Chief Justice Marshall in *American Insurance Co. v. Canter*.³⁹ Although the reasons for opposing opinions to acclaim *Canter* may be attributed more to judicial advocacy than an analysis of applicable constitutional principles, the rationale of *Canter* is an appropriate benchmark for analysis. *Canter* involved a collateral attack on the final judgment of a non-article III territorial court, granting a salvage award that would fall within the exclusive jurisdiction of the federal district court's admiralty and maritime power as authorized by article III and conferred by Congress.⁴⁰ Chief Justice John Marshall's opinion accepts the premise that if Florida had been a state, the judgment by the article I court could have been held void because it would have been in direct contravention of article III. Marshall reasoned the judgment involved in *Canter* did not contravene article III because the article did not apply to territories such as Florida prior to statehood.⁴¹

Because it did not apply, the article could not limit Congress' powers to establish, authorize and bestow jurisdiction on non-article III tribunals within territories.⁴² Although this view of *Canter* would seem to be uncontestable, the language of Chief Justice Marshall, when lifted out of context, seemingly would invite im-

38. 28 U.S.C. § 1332 (1976).

39. 26 U.S. (1 Pet.) 511 (1828). See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). An excellent example of article III conflict is the *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), and *Glidden Co.*, fight over the article III status of the Court of Customs and Patent Appeals.

40. Spain ceded Florida to the United States in 1819. Florida continued as a territory of the United States, governed by virtue of the constitutional directive to Congress in article IV, § 3, to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." In 1822, an act establishing a territorial government in Florida was passed. The law creating a territorial tribunal in *Canter* was a result of an amendment to the 1822 act. The Supreme Court upheld the validity of an admiralty decree even though it was rendered by the inferior territorial (non-article III) court.

41. 26 U.S. (1 Pet.) at 546.

42. 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN, J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 0.3 (2d ed. 1982) (hereinafter *MOORE'S FEDERAL PRACTICE*).

permissible conclusions:

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.⁴³

Marshall's statement does not mean that Congress cannot confer jurisdiction upon a territorial or legislative court functioning within a territory over a patent infringement suit, for example, that must be brought in a federal district court sitting in one of the states. Thus, not only may a territorial court exercise jurisdiction over all of the disputes and controversies that could be conferred upon an article III court sitting in one of the states, but, because article III does not apply, the courts may possess full and complete general jurisdiction.⁴⁴

Justice White's dissent not only chooses to misread *Canter*, by arguing that Chief Justice Marshall was in error, but also strains judicial advocacy to the point of intellectual dishonesty in asserting Justice Harlan's plurality opinion in *Glidden Co. v. Zdanok* repudiated *Canter*.⁴⁵ "Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so."⁴⁶ To the contrary, Justice Harlan's opinion in *Glidden* reflects the clearest of understandings that the *Canter* decision is not restricted by *Murray's Lessee v. Hoboken Land & Improvement Co.*⁴⁷ The Supreme Court's decision in *Canter* fairly and squarely presents a rational basis for repudiating the argument of the *Northern Pipeline* dis-

43. 26 U.S. (1 Pet.) at 546.

44. 1 MOORE'S FEDERAL PRACTICE ¶ 0.4 (2d ed. 1982).

45. 102 S. Ct. at 2892-93.

46. *Id.* (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 545 n.13 (1962)).

47. 59 U.S. (18 How.) 272 (1856).

sent. Article III does not limit Congress' power to confer jurisdiction over a case or controversy upon a territorial court such as existed in Florida that otherwise would fall within article III, because article III does not apply to such territories. The dissent in substance seeks to pretend that article III does not apply to federal courts sitting within one of the states at the whim of Congress. The great Chief Justice Marshall, whose *Marbury v. Madison*⁴⁸ decision valiantly achieved the reality of political power necessary to convert from theoretical status the philosophic concepts of separation of powers and independence of the judiciary, would be aghast to find that the greatest threat to article III is found within the Supreme Court.

Indeed, territorial courts must possess general jurisdiction in order to provide a total system of justice within the territory. No other interpretation would work. All of the states at the time of the adoption of the constitution had their own complete judicial systems.⁴⁹ Territories, on the other hand, would require a complete judicial system emanating from the national sovereign.⁵⁰ Traditional territorial status and territorial courts were inherently ephemeral in abiding the transition to statehood.⁵¹ In unincorporated territories like the Phillipines, the transition was to independence.⁵² The application of article III to territories with its accompanying limitations would have produced an unacceptable void. When a territory becomes a state, then such additional sovereign can provide an adequate judicial system and article III can properly function to limit the federal judicial power of our dual sovereign system of federalism.

The principles of *Canter* are not directly applicable to the District of Columbia.⁵³ Neither are the Court's decisions involving the District of Columbia particularly helpful in determining the constitutionality of the Bankruptcy Act.⁵⁴

As the permanent seat of the national sovereign, the District of

48. 5 U.S. (1 Cranch) 137 (1803).

49. 1 MOORE'S FEDERAL PRACTICE ¶ 0.1 (2d ed. 1982).

50. *Id.* ¶ 0.4[1] ("The *Canter* decision rests, then, on the principle that vis-a-vis the States, the Congress exercises a limited judicial power, but as to the territories it exercises the full powers of a sovereign, including the power to create judicial tribunals.").

51. *Id.* ¶ 0.4[3].

52. *See id.* ¶ 0.3[3.1].

53. *Palmore v. United States*, 411 U.S. 389 (1973). *But see O'Donoghue v. United States*, 289 U.S. 516 (1933).

54. *See National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). *See also* notes 80-89 and accompanying text.

Columbia is a unique territory. Congress should be able to exercise and create courts pursuant both to article III and article I powers within the District of Columbia.⁵⁵ Congress might well be able to create an article I court and bestow jurisdiction over cases and controversies that otherwise would fall within article III, and combine in that court jurisdiction over disputes that do not constitute a case or controversy within the meaning of article III.⁵⁶ On the other hand, if Congress does choose to create an article III court within the District of Columbia, such court could not be conferred with non-article III jurisdiction,⁵⁷ that is, the power to render advisory opinions. The result is not as paradoxical as it might initially appear because Congress, in the District of Columbia, should not be limited to the option of only article I or only article III courts. If Congress, in the District of Columbia, may exercise under article I those sovereign powers that the sovereign state of Virginia can exercise in the state of Virginia, it should be able to establish a dual system of courts with the exercise of concurrent jurisdiction by the non-article III court on all matters which have not been exclusively vested in the article III court.⁵⁸ Indeed, one of the distinguishing features of American federalism is the exercise of concurrent jurisdiction by state courts over all cases and controversies

55. 411 U.S. at 406-07. In *Palmore*, the Court held that Congress could, under its article I power to legislate for the District of Columbia, provide for trying criminal cases in the district before courts with non-article III judges:

It was neither the legislative nor judicial view, therefore, that trial and decision of all federal questions were reserved for Art. III judges We do not discount the importance attached to the tenure and salary provisions of Art. III, but we conclude that Congress was not required to provide an Art. III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia. *Palmore's* trial in the Superior Court was authorized by Congress' art. I power to legislate for the District in all cases whatsoever.

411 U.S. at 402, 410.

56. 1 MOORE'S FEDERAL PRACTICE ¶ 0.4[1] (2d ed. 1982) ("Article [III] limits the jurisdiction of a constitutional court to cases and controversies, interpreted to mean that nonjudicial functions cannot be imposed on such a court").

57. *Id.* ¶ 0.4[4] (classification of District of Columbia courts as hybrid).

58. This is the essential rationale of *Palmore*:

Here Congress has expressly created two systems of courts in the District. One of them is made up of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, which are constitutional courts manned by Art. III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern which so moved the Court in *O'Donoghue*. The other system is made up of strictly local courts, the Superior Court and the District of Columbia Court of Appeals. These courts were expressly created pursuant to the plenary Art. I power to legislate for the District of Columbia. 411 U.S. at 406-07.

that can be brought in the federal court unless the national sovereign under the supremacy clause has vested the exclusive jurisdiction in a federal instrumentality.⁵⁹

*Crowell v. Benson*⁶⁰ and the other array of cases cited by the dissent do not support the Chief Justice's proposal, as tempting as it may be.⁶¹ This is not to say that justices in prior opinions have not expressed views that could be read in support. Not atypical of such judicial dissonance is *National Insurance Company v. Tidewater Transfer Company*,⁶² cited by both the *Northern Pipeline* plurality and the dissent.⁶³ In *Tidewater*, three justices upheld the constitutionality of a statute making a citizen of the District of Columbia a citizen of a "state" for diversity jurisdiction on the basis that Congress could bestow article I jurisdiction on the federal district courts sitting in the states.⁶⁴ Six justices rejected such reasoning.⁶⁵ Two justices upheld the constitutionality of the statute by an expansive reading of article III.⁶⁶ Seven justices rejected this rationale.⁶⁷ The statute was thus held constitutional because, as noted by dissenting Justice Frankfurter, conflicting minorities of three and two combined for a plurality of five.⁶⁸

The use of the *Tidewater* case as meaningful precedent is, of

59. 1 MOORE'S FEDERAL PRACTICE ¶ 0.6[1], [3], [4] (2d ed. 1982).

60. 285 U.S. 22 (1932).

61. 102 S. Ct. at 2891-92.

62. 337 U.S. 582 (1949).

63. 102 S. Ct. at 2866, 2872 n.26, 2892-93.

64. The three-justice plurality consisted of Justice Jackson, joined by Justices Black and Burton. 337 U.S. at 583, 604. A total of five justices upheld the statute even though they were split as to the ground for so doing. Justices Rutledge and Murphy concurred in sustaining the statute. 337 U.S. at 604.

65. The six (Rutledge, Murphy, Frankfurter, Reed, Vinson, Douglas) disagreed with the plurality opinion as Congress had no power to enact the statute under article I, § 8 which authorizes Congress to exercise exclusive legislation in the District of Columbia. However, this six-man faction was split as to whether there were any grounds on which the statute was valid.

66. Justice Rutledge, joined by Justice Murphy, based the validity of the statute upon the view that the District of Columbia was the equivalent of a state within article III, § 2, and thus Congress could pass such a statute by way of article III. 337 U.S. at 604-26.

67. Only Rutledge and Murphy gave this expansive reading to article III.

68. A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected — but not the same majority. And so, conflicting minorities in combination bring to pass a result — paradoxical as it may appear — which differing majorities of the Court find unsupportable.

337 U.S. at 655 (Frankfurter, J., dissenting).

course, replete with doubt.⁶⁹ The only tenable and defensible view, the expansive reading of article III expressed by Justice Rutledge, could muster only one other supporting vote.⁷⁰

Justice Jackson's article I theories, which would support Chief Justice Burger's proposal, were unfortunately founded upon fallacious premises, the principle one being that the exercise of bankruptcy jurisdiction by the federal district court was an illustration and example of an article III court also conferred jurisdiction under article I.⁷¹ Thus, Congress could utilize other authorizations of jurisdictional powers under article I for determination by an article III court. This also would mean that article III courts could be required, by virtue of article I powers, to render advisory opinions. Justice Jackson's thesis fails, however, not merely because of its absurdity, but because, as noted by Justice Frankfurter, the exercise of bankruptcy jurisdiction is a classic example of federal question jurisdiction (a case "arising under") that is expressed or authorized to be conferred under article III. "To find a source for the 'judicial power,' therefore, which may be exercised by courts established under article III of the Constitution *outside* that article would be to disregard the distribution of powers made by the Constitution."⁷²

69. See *supra* note 64 and accompanying text.

70. 337 U.S. at 604.

71. Congress also is given power in Art. I to make uniform laws on the subject of bankruptcies. That this, and not the judicial power under Art. III, is the source of our system of reorganizations and bankruptcy is obvious. Not only may the district courts be required to handle these proceedings, but Congress may add to their jurisdiction cases between the trustee and others that, but for the bankruptcy powers, would be beyond their jurisdiction because of lack of diversity required under Art. III.

337 U.S. at 594 (citation omitted). Justice Jackson went on to observe:

[W]e must rely on the Art. I powers of the Congress. We have been cited to no holding that such jurisdiction cannot spring from that Article. Under Art. I the Congress has given the district courts not only jurisdiction over cases arising under the bankruptcy law but also judicial power over nondiversity cases which do not arise under that or any other federal law.

Id. at 599.

72. 337 U.S. at 652 (Frankfurter, J., dissenting) (emphasis added) (footnote omitted). In thorough fashion, Frankfurter continues:

[t]he congeries of controversies thus brought into being by reason of bankruptcy may be lodged in the federal courts because they arise under "the Laws of the United States," to wit, laws concerning the "subject of bankruptcies." It is a matter of congressional policy whether there must be a concurrence of all claims affecting the bankrupt's estate in the federal court in which the bankruptcy proceeding is pending or whether auxiliary suits be pursued in other federal courts.

Id. at 652 n.3.

Frankfurter even receives aid from Justice Rutledge in dismissing Jackson's theories.

If Justice Frankfurter's argument is not deemed immediately fatal to the article I line of reasoning, the coup de gras is that Jackson's analogy example fails completely when applied to the Supreme Court. The Supreme Court, having been created by article III, is certainly the purest of the pure article III tribunals.⁷³ The Supreme Court has consistently rejected jurisdiction to decide any matter that does not come within article III.⁷⁴ The Supreme Court, of course, has decided countless bankruptcy cases and no one, not even Justice Jackson, has been audacious enough to suggest that this is an illustration of Congress conferring article I powers on the Supreme Court. Even when the Supreme Court, under its appellate jurisdiction, is reviewing the decision of an article I tribunal, the test is not whether the initial proceeding before the agency was a case or controversy within article III, but whether the ruling appealed from and presented to the Supreme Court constitutes a case or controversy.⁷⁵

The *Tidewater* advantage as an article III precedent is simply that it can be cited for most anything. Not surprisingly, both Justices Brennan and White cite *Tidewater* in support.⁷⁶ To Justice White's credit, however, he did not pursue and reiterate the views of Justice Jackson which, of course, if valid, would have provided considerable support to the constitutionality of the 1978 Bankruptcy Act.⁷⁷

Notwithstanding the justices' discussions in *Northern Pipeline* of the District of Columbia precedent, such cases tend to obfuscate the basic constitutional problems. A critical and better analysis of the divergent views can be made by contrasting the support for an adjunct or special master analogy with the support for utilization of article I tribunals in areas of specialization.⁷⁸ Under this ap-

"[A]s Mr. Justice Frankfurter's opinion makes clear, federal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional federal-question jurisdiction. And no case cited in any of today's opinions remotely suggests the contrary." *Id.* at 611 (Rutledge, J., concurring).

73. 1 MOORE'S FEDERAL PRACTICE ¶ 0.7[2] (2d ed. 1982).

74. 1 MOORE'S FEDERAL PRACTICE ¶ 0.6[6] (2d ed. 1982).

75. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

76. Justice Brennan cites Frankfurter's dissent in *Tidewater* in text as support for respecting Congress' vestiture of jurisdiction to the non-article III bankruptcy courts. 102 S. Ct. at 2866. Additionally, Justice Brennan cites Justice Rutledge's concurring opinion to support the thought that "[t]his claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization." *Id.* at 2872 n.26.

77. *Id.* at 2892-93.

78. See Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 Geo. L.J. 297, 308-10 (1981).

proach the reasoning of Justice White's dissent does not fare well. This suggests that the Chief Justice's advice is fraught with constitutional invalidity. It also suggests that "Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts."⁷⁹

The bankruptcy court's expanded jurisdiction, free from interfering supervision and control by the federal district court, and the autonomy of the bankruptcy judge, coupled with his investiture of virtually full judicial power—the hallmarks of the 1978 reform—foreclose any fair analogy to the role of this new bankruptcy judge to that of a special master.⁸⁰ Justice White's position is supported neither by the terms of the Act nor by precedent. The case proposed by the Chief Justice, if intended to be upheld under the special master or adjunct theory, has two major faults. First, as noted, taking away the bankruptcy judge's jurisdiction over the *Northern Pipeline* types of cases does not in any way change the judge's status and relationship with the article III courts to which it is supposed to be an adjunct. If, however, the threatening possibility of Justices Rehnquist and O'Connor subscribing to the dissent's adjunct argument is considered, a far greater political danger would arise that could threaten the very structure of the separation of powers doctrine and independency of our judicial system.⁸¹ It would mean that United States magistrates could be given the same independence and powers. The desire of the article III judiciary to shed the burden and problems of bankruptcy cases cannot justify fantasizing the role of bankruptcy judges as adjuncts in subjugation, if not sacrifice, of the principle of separation of powers.

Justice White, in his dissent's intertwining of two essentially collateral and independent arguments, adjuncts and specialization

79. 102 S. Ct. at 2869 n.18; *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977). See *United States v. Raddatz*, 447 U.S. 667 (1980); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-47 (1937). See also *Yakus v. United States*, 321 U.S. 414 (1944).

80. 28 U.S.C. § 151 (Supp. III 1979). See *Expanding Role of U.S. Magistrates and Masters: A Panel*, 47 A.B.A. ANTITRUST L.J. 1253 (1979); Berger, *Away from the Courthouse and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978). As Justice Brennan writes, "[u]nlike the administrative scheme that we reviewed in *Crowell*, the Act vests all 'essential attributes' of the judicial power of the United States in the 'adjunct' bankruptcy court." 102 S. Ct. at 2878.

81. See Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979).

powers under article I, fails to mask their implicit and explicit flaws. The diversion that the adjunct argument is so totally devoid of merit that it makes the specialization argument superficially appear better by comparison, is not a sufficient buttress. There are two aspects of the specialization argument discussed by the plurality and the dissent.

The invalidity of the White dissent's reasoning concerning Congress' Article I powers is not predicated so much upon the merits of its arguments in the abstract, but the inapplicability of the position in the context of the Bankruptcy Reform Act in the *Northern Pipeline* case. The Bankruptcy Reform Act of 1978 did not create an administrative remedy to be initially determined by an administrative body in which the United States was a party, as, for example, Congress had done in the area of unfair labor disputes with the National Labor Relations Board.⁸² *Northern Pipeline's* dispute was not converted into an administrative matter; it was an old-fashioned, traditional lawsuit that otherwise would have been heard in state court, or if diversity existed, in a federal district court. The Bankruptcy Reform Act simply took jurisdiction away from those tribunals and placed the identical case before the non-article III bankruptcy judge.⁸³

The specialization argument, as presented in the context of this case, would seem to be a sophisticated way of saying that because bankruptcy cases are the unwanted stepchild of the federal judicial system, they may be disinherited by Congress without heeding article III.⁸⁴ Patent infringement, antitrust, securities and admiralty,

82. This is not to say that Congress could not create an administrative or adjunct bankruptcy system to cure the constitutional defect. The 1978 Act simply was not drafted as an administrative system. The plurality points to the basic principle underlying *Crowell*: "*Crowell* recognized that Art. III does not require 'all determinations of fact [to] be made by judges,' . . . with respect to congressionally created rights, some factual determinations may be made by a specialized fact finding tribunal designed by Congress, without congressional bar." 102 S. Ct. at 2876 (citations omitted).

To create an administrative or adjunct bankruptcy system, without conferring article III status, Congress would have to remove some of the independence of the judges under the 1978 Act. "[T]he agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal." 102 S. Ct. at 2879.

83. See Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (1981); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980).

84. "The plurality concedes that Congress may provide for initial adjudications by Article I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." 102 S. Ct. at 2883 (White, J., dissenting). However, Brennan is quick to re-

to list a few, are considered by some to be areas of specialization. The argument that specialization limitations could not lead to "wholesale assignment of federal judicial business to legislative courts" is aptly rejected by the plurality as "wholly illusory."⁸⁵

The unresolved aspect of specialization on which Justices Rehnquist and O'Connor might have joined the dissent, if the issue were presented by the case, is whether Congress in the area of bankruptcy could create an administrative remedy to be presented to an administrative agency in which the United States would be a party.⁸⁶ Justice Rehnquist does not say that an administrative system is invalid. Rather, he merely states that the 1978 Act fails to create a constitutional administrative bankruptcy system.⁸⁷

The plurality in dicta contends that Congress could not do so. After first noting that Congress did not constitute the bankruptcy court as a legislative court, Justice Brennan acknowledges that when Congress creates a substantive right, Congress has some powers concerning the "adjudication [of] that right."⁸⁸ This power allows Congress to create an administrative agency in which the United States is a necessary party.⁸⁹ The plurality, however, contends "the substantive legal rights at issue in the present action cannot be deemed 'public rights.'"⁹⁰ The implication is that the substantive rights could not have been converted to public rights if

spond [w]e do not concede" that Congress can delegate as Justice White suggests. "Rather we simply reaffirm the holdigg of *Crowell*— that Congress may assign to non-Art. III bodies some adjudicatory functions. *Crowell* itself spoke of specialized functions." Brennan informs White that "[t]his case does not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights." *Id.* at 2876 n.32.

85. *Id.* at 2872-73.

86. See *infra* notes 102-104 and accompanying text.

87. *Id.* at 2882 ("the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell v. Benson*").

88. *Id.* at 2878 n.35.

89. The plurality attempts a detailed discussion of the public rights doctrine—the basis of which could sustain the creation of an administrative bankruptcy system. One aspect of the doctrine focuses on the "necessity" of the United States as a participant:

It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but *not sufficient* means of distinguishing "private rights" from "public rights". . . . Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review.

Id. at 2870-71 n.23 (citations omitted) (emphasis added).

The major exception to the doctrine is that it "does not extend to any criminal matters, although the government is a proper party." *Id.* at 2871 n.24.

90. *Id.* at 2871.

Congress had created an administrative remedy for adjudication by an administrative agency in which the United States is a party.

The unresolved constitutional issue is whether Congress has the political choice to create for all bankruptcy matters an administrative remedy for determination by a federal agency to replace judicial remedies cognizable in an article III court. If so, then Congress has three different categories of choices and is not limited to either conferring the bankruptcy judges with article III status,⁹¹ or re-vamping the bankruptcy act to cede jurisdiction of what previously were plenary matters and placing the control and supervision of the bankruptcy judge sufficiently under the agency of a district court⁹² on a true adjunct or special master relationship. Notwithstanding the divergence of the judicial views concerning article III, Congress surely does have all three choices. *Crowell v. Benson*⁹³ and other cases on which both the plurality and dissent rely do not preclude the option to create an appropriate bankruptcy agency. Considering the time constraints for creative legislation, however, Congress may well prefer to consider its other political options.⁹⁴

The problems surrounding *Crowell v. Benson* are most analogous to the alternative bankruptcy choices which now must be resolved by Congress. *Crowell* should not be considered authority which would preclude Congress from creating an administrative remedy and agency to handle most bankruptcy matters. *Crowell* was decided during the formative years of administrative law when the judiciary evidenced suppression and hostility towards its emergence and the New Deal legislation that spawned it. *Crowell* can be fairly read to support Congress' right to create an administrative remedy in lieu of a judicial remedy and vest such in an administrative agency. It is difficult, however, to read *Crowell* in support of the theories expressed by either Justice Brennan or Justice White.

The narrow issue in *Crowell* was whether the federal district court could determine de novo what was labeled a jurisdictional fact:

It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of

91. H.R. 6978. See *supra* note 15.

92. H.R. 7294. See *supra* note 16.

93. 285 U.S. 22 (1932).

94. See *infra* notes 107-08 and accompanying text.

the facts upon which the enforcement of the constitutional rights of the citizen depend.⁹⁵

The administrative scheme in *Crowell* upon which the issue arose differs significantly from the provisions of the Bankruptcy Reform Act. The Court stated in *Crowell*:

Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.

The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges.⁹⁶

The Court considered the issue of employment to be a jurisdictional fact in that the Act did not authorize relief to be otherwise provided.⁹⁷ The more traditional type of jurisdictional fact would be the state of a party's citizenry in a suit invoking diversity jurisdiction. The Court noted the act did not expressly prohibit the court from reexamining jurisdictional facts, and that such construction was preferable because it would obviate constitutional problems: "[t]he Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final."⁹⁸

Because the scope of review was to invoke the equity powers of a federal court, additional evidence could be considered. "We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it."⁹⁹ These constitutional problems did not relate to the political power of

95. 285 U.S. at 56.

96. *Id.* at 51.

97. *Id.* at 54-57.

98. *Id.* at 62.

99. *Id.* at 64.

Congress to opt for an administrative remedy to be determined by a federal agency.

The *Crowell* Court's constitutional concerns over the extent of review that an article III court must possess over an agency have been long laid to rest. The distinction between public and private rights that permeated *Crowell* also seems to have disappeared. Under the police power to promote the general welfare, and the necessary and proper clause,¹⁰⁰ private rights may easily be transformed into public rights. Considering that the Constitution expressly vests control of bankruptcy in the national sovereign¹⁰¹ and the general public importance of providing appropriate relief to debtors and creditors, the distinction between public and private rights as a basis for constitutionally limiting the power of Congress evaporates.

If Congress chooses to maintain the current status of bankruptcy judges under article I and wishes to maintain the basic structure of the Bankruptcy Reform Act of 1978, this can be accomplished. First of all, the Constitution gives Congress plenary powers over bankruptcy.¹⁰² Whatever continued vitality *Crowell* may have in reference to the necessity for public rights could easily be solved by simply vesting in the United States the rights and interests of the bankrupt. These rights and interests could be awarded, administered and determined by a new federal agency. The structural changes necessary to accomplish this would be minimal and would be within the framework of the existing act. The essential aspect would be that the United States would become a named party, making claims and actions by and against the United States.¹⁰³ The Act thus could continue to allow, for example, a debtor in possession to operate a business under an arrangement or a plan of reorganization. Claims or choses in action that the bankrupt entity has would pass to the United States for assertion. Thus, in the present *Northern Pipeline* case, the action would be brought in the name of the United States, which would receive any of the pro-

100. U.S. CONST. art. I, § 8, cl. 18.

101. "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

102. U.S. CONST. art. I, § 8, cl. 4.

103. Such a structure would overcome Justice Brennan's refusal to recognize *Crowell* and the public rights doctrine's applicability to bankruptcy matters. In an area where it is certainly true as stated by Justice Brennan — "[t]he distinction between public rights and private rights has not been definitively explained in our precedents" — one would be hard pressed under this proposed structure to challenge the public rights doctrine. 102 S. Ct. at 2870-72.

ceeds as a result of such litigation and which would then be distributed in accordance with the bankruptcy administration. As it is unquestioned that Congress can vest disputes between employer and employees before a federal agency that otherwise would have been determined in state or federal court, it would have no less power in reference to bankruptcy.¹⁰⁴

Probably the more appealing choice from both the political perspective and the efficiency of the federal judiciary would be, as proposed in the house bill, to confer article III status upon bankruptcy judges.¹⁰⁵ The advantage would be that such judges also could carry on additional functions in the federal district court and any slack time in the bankruptcy docket could be filled by assisting with the other demands on the federal district court. The difficulty will be whether to, in essence, "grandfather in" the current bankruptcy judges as federal judges or to enter into a new selection process.¹⁰⁶ Certainly there is no reason that would constitutionally require the present bankruptcy judges to be named and conferred article III status. The issue will arise, however, in reference to a bankruptcy judge who has been given a statutory tenure if he is not selected and confirmed as an article III judge. One possible solution would be to reduce the number of article III judges appointed from the current number of bankruptcy judges and to utilize some of the bankruptcy judges who are not given article III status as special masters. This approach does present some circular aspects. If some of the current bankruptcy judges are not going to be named as article III judges and their services, in order to comply with the statutory tenure commitment, are going to be satisfied by utilizing such personnel as bankruptcy special masters, why not simply use all of the current bankruptcy judges as special masters and make a nominal increase in the number of federal district court article III judges? This would mean that Congress would provide sufficient manpower in the form of article III judges to try such cases as the instant *Northern Pipeline* decision but also would utilize the current bankruptcy judges as true adjuncts. This

104. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

105. See *supra* note 15.

106. Should Congress opt to confer article III status upon bankruptcy judges, it would entail approximately 200 appointments and confirmations, a possibility in which Congress has not exhibited confidence. Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, H.R. 6109, 97th Cong. 2d Sess. 5, 12-16, 23-24, 26-27, 35 (1982). H.R. 6109 was the forerunner of H.R. 6978. House Comm. on the Judiciary, Bankruptcy Court Act of 1982, H.R. Rep. No. 807, 97th Cong., 2d Sess. 2 (1982).

would require, however, further restructuring of the Reform Act to make such judges directly accountable to and reviewable by the federal district court, including the power to require that the article III judge has the power to control the reference of the proceedings to the ancillary bankruptcy judge, the power to revoke any such reference and to review and recommend orders by the bankruptcy judge as well as the right to take additional evidence.¹⁰⁷ The role of the bankruptcy judge if he is going to be converted into an adjunct or the equivalent of a special master should not exceed the independence displayed by the United States magistrate that the Supreme Court upheld in *Raddatz*.¹⁰⁸ This compromise would avoid the necessity of returning bankruptcy practice to the pre-1978, if not 1976 era. Considering the hundreds of thousands of bankruptcy matters that are filed on an annual basis, there is certainly justification for Congress creating a limited number of article III judges whose primary responsibility would be bankruptcy.

Congress should also well consider establishing a new United States Court of Appeals for bankruptcy. The occasion for this approach is not merely to reduce the possibility of intercircuit conflict but to provide a means of quickly and expeditiously resolving bankruptcy disputes. Such cases now are not priority matters and are apt to languish for time periods on appeal that create by the mere passage of time geometric problems in the administration of the bankruptcy estate. It will, however, not permit the luxury of Congress making a political choice upon reflective analysis of the various available alternatives. Congress must act swiftly and quickly. Perhaps the final danger is that the need to expedite action will prove more pressing than the preservation of separation of powers principles.

Congress's choice of solutions may have been effectively preempted by the Supreme Court's denial of an additional stay. The impact could be considered a power ploy by the Chief Justice to effect adoption of his advisory suggestion, which has been promulgated by interim Bankruptcy Rules recommended by the Judicial Conference.¹⁰⁹ The adoption of these rules has temporarily suspended chaos.

To avoid chaos, the lower federal courts may well be tempted to

107. 102 S. Ct. at 2874-80. Thus, the federal district courts would be replenished with "most, if not all, of 'the essential attributes of the judicial power.'" *Id.* at 2880.

108. See *supra* note 8.

109. See 3 BANKR. L. REP. (CCH) ¶ 68,908 (Dec. 1982); see also *National Law Journal*, January 31, 1983, at 3.

uphold the constitutionality of the Interim Rules, and fact accompli might then have to be granted recognition by Congress. The political make-up of the present government seemingly would necessitate an adroit compromise, indeed.